

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEE DAVIS III,

Defendant and Appellant.

F075303

(Super. Ct. No. F15903774)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Nick Fogg and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

---

\*Before Franson, Acting P.J., Peña, J. and DeSantos, J.

## **INTRODUCTION**

Defendant Robert Lee Davis III was charged and convicted of multiple counts of second degree robbery, attempted second degree robbery, assault with a firearm, and being a felon in possession of a firearm after robbing or attempting to rob numerous businesses around Fresno over a matter of weeks. He also pled no contest to a related count for dissuading a witness. He seeks a new sentencing hearing to permit the trial court to exercise its discretion and decide whether to strike the imposed firearm enhancements in light of Senate Bill No. 620 (2017–2018 Reg. Sess.) (Senate Bill 620). He also contends the abstract of judgment should be amended to correct clerical errors related to his sentence.

We agree with defendant the abstract of judgment requires modification to accurately track the trial court’s pronouncement of judgment as further stated herein. Additionally, we remand the matter to the trial court to permit it to exercise its discretion regarding whether to strike the firearm enhancements in light of Senate Bill 620. In all other respects, the judgment is affirmed.

## **FACTUAL BACKGROUND**

After a series of robberies occurred over a 15-day period in Fresno, California, defendant and Joseph Islas were charged and tried jointly in connection with the offenses.<sup>1</sup> The court empaneled dual juries—separate juries for each defendant. The parties stipulated that on June 10, 2015, until June 17, 2015, defendant was required to wear a GPS tracking ankle device monitored by Satellite Tracking of People (STOP). The data collected from defendant’s ankle monitor placed him at the scene of four of the six robberies or attempted robberies charged, including all those that occurred after defendant began wearing the monitor. The specific facts underlying each of the charged

---

<sup>1</sup>An additional perpetrator, John Cabrera, was also charged in connection with some of the robberies, but his case was severed from the joint trial.

offenses are not relevant to this appeal and are detailed further in our opinion in *People v. Islas*, F075575.

The jury convicted defendant of all counts—eight counts of second degree robbery in violation of Penal Code section 211 (counts 1, 2, 3, 4, 7, 10, 11, and 12), two counts of attempted second degree robbery in violation of sections 664 and 211 (counts 5 and 6), two counts of assault with a firearm in violation of section 245, subdivision (a)(2) (counts 8 and 9), and one count of possession of a firearm by a felon in violation of section 29800, subdivision (a)(1) (count 14).<sup>2</sup> The jury also found true enhancement allegations that a principal was armed with a firearm in violation of section 12022, subdivision (a)(1) (with respect to counts 1, 2, 3, 5, 6, 10, 11, and 12), defendant personally used a firearm pursuant to section 12022.53, subdivision (b) (with respect to counts 4 and 7), and he admitted he had a prison prior within the meaning of section 667.5, subdivision (b). Defendant also pled no contest in a related matter, No. F16906002, to a violation of section 136.1, subdivision (c)(1) for dissuading a witness by threat.

Defendant was sentenced to a total term of 28 years 4 months in state prison. Specifically, he was sentenced to the aggravated term of five years on count 4 (second degree robbery), enhanced by a term of 10 years for the Penal Code section 12022.53, subdivision (b) allegation and an additional year for the section 667.5 prison prior allegation; a consecutive term of 1 year on count 7, enhanced by a term of three years four months for the section 12022.53, subdivision (b) allegation; consecutive terms of one year on each count for counts 1, 3, and 10 (second degree robbery) each enhanced by a term of four months for the section 12022, subdivision (a)(1) allegation; the aggravated term of five years for each count on counts 2, 11, and 12 (second degree robbery) each enhanced by a term of one year for the section 12022, subdivision (a)(1) allegation, to run

---

<sup>2</sup>The parties stipulated defendant had a prior felony conviction. Additionally, count 13 was only charged against codefendant Joseph Islas.

concurrently with the terms to be served in counts 4 and 7; a consecutive total term of one year on count 5 (attempted second degree robbery), which includes an enhancement for the section 12022, subdivision (a)(1) allegation; a concurrent term of three years on count 6 (attempted second degree robbery), enhanced by a term of one year for the section 12022, subdivision (a)(1) allegation; concurrent terms of four years for each count on counts 8 and 9 (assault with a firearm); and a concurrent term of three years on count 14 (possession of a firearm by a felon). He was also sentenced to a consecutive term of three years in related case No. F16906002.

## **DISCUSSION**

### **I. Remand in Light of Senate Bill 620**

Senate Bill 620, signed into law on October 11, 2017, amended Penal Code sections 12022.5 and 12022.53 to provide the trial court with discretion to dismiss, in furtherance of justice, firearm enhancements pursuant to sections 12022.5, subdivision (c), and 12022.53, subdivision (h). The new law took effect on January 1, 2018. The law is applicable to those parties, like defendant, whose appeals were not final on the law's effective date. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678–679.)

Here, the jury found true enhancement allegations that defendant personally used a firearm pursuant to section 12022.53, subdivision (b) (with respect to counts 4 and 7). Defendant's sentence was enhanced by these allegations and he seeks remand for a new sentencing hearing to permit the court to exercise its discretion regarding whether to strike the firearm enhancements in light of Senate Bill 620. The People concede Senate Bill 620 applies retroactively and that remand is appropriate on this basis.

The Supreme Court has held: “A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a

defendant's record.' [Citation.] In such circumstances, ... the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

Here, the record does not reflect the trial court knew it had discretion to strike defendant's firearm enhancements; nor does it reflect a clear indication by the trial court that it would not have struck these enhancements if it had the discretion to do so. Accordingly, we accept the People's concession and, while we offer no position on how the trial court should act when exercising its newfound discretion under Senate Bill 620, we conclude the trial court should be provided the opportunity to exercise that discretion.

## **II. Abstract of Judgment Should Be Amended**

Defendant next contends the abstract of judgment contains the following errors: "First, the sentence on count 5 (attempted robbery) is listed both as an upper-term sentence and as a consecutive 1/3 [mid-term] sentence offense. Rather, it should be listed as an 8-month (i.e., 1/3 mid-term) consecutive sentence." Additionally, he contends "the 3-year sentence on count six (attempted robbery) is listed as an upper-term sentence and a consecutive 1/3 [mid-term] sentence. The sentence should be listed as a concurrent upper-term of 3 years." Defendant notes the abstract suggests he was sentenced to a consecutive three-year term on count 6. The People concede the record supports correction of the abstract on these grounds.

A trial court's oral judgment controls and "[w]hen an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, this court has the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties." (*People v. Jones* (2012) 54 Cal.4th 1, 89.)

At the sentencing hearing the court ordered, in pertinent part:

“As to Count 5, the felony violation of Penal Code section 664/211, ... the Court is ordering that that term, as well as the enhancement under Penal Code section 12022(a)(1), run consecutive to the time imposed in Count 4. For a total commitment on Count 5 of one year.”

The court further stated:

“[A]s to Count 6, the felony violation of Penal Code section 664/211, attempted robbery ..., the Court is imposing the term of 3 years, which is enhanced pursuant to Penal Code section 12022(a)(1) by 1 year. For a total commitment of 4 years, but that will ... run concurrent with the time imposed ... on Count 4.”

The jury convictions for attempted second degree robbery in counts 5 and 6 authorize sentences of 16 months, two years, or three years for each count. (Pen. Code, §§ 18, 213, subd. (b).) While the court did not explicitly designate the term imposed on count 5 as a middle or upper term, the total term of one year reflects the court intended to impose the middle term, i.e., one-third the middle term (8 months) and one-third the one-year enhancement (four months), for a total term of one year on count 5. Therefore, we agree with defendant’s contention and accept the People’s concession that the upper term reference in the abstract of judgment regarding count 5 should be stricken.

As defendant and the People correctly argue, the court imposed a “term of 3 years [on count 6], which is enhanced pursuant to Penal Code section 12022(a)(1) by 1 year. For a total commitment of 4 years, ... [which] will ... run *concurrent* with the time imposed ... on Count 4.” (Italics added.) Therefore, the abstract should reflect an upper term for the attempted robbery conviction (three years), one year for the section 12022, subdivision (a)(1) enhancement, and that the total four-year term is to run concurrent with the sentence imposed on count 4. Accordingly, we also agree with defendant’s contention and accept the People’s concession that the portion of the abstract of judgment that states the term imposed on count 6 is “Consecutive 1/3” should be stricken and this sentence should be designated to run concurrently.

## **DISPOSITION**

The upper term reference in the abstract of judgment regarding count 5 and the portion of the abstract of judgment that states the term imposed on count 6 is “Consecutive 1/3” are ordered stricken and the abstract of judgment should be amended to reflect the sentence on count 6 runs concurrently. The trial court is ordered to prepare an amended abstract of judgment reflecting these changes and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. The matter is remanded to the trial court to exercise its discretion under Penal Code section 12022.53, subdivision (h), as amended by Senate Bill 620 and, if appropriate following exercise of that discretion, to resentence defendant accordingly. In all other respects, the judgment is affirmed.